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No. 80-1964

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

HOLIDAY MOBILE HOME RESORTS, INC. AND WILFRED O. DUNKEL,

Petitioners,

vs.

R. DIXON WOOD AND DON W. HEIPLE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Was it improper for the state court of appeals to conclude that the assets of a limited partnership in which the corporate debtor was merely the general partner were not subject to a federal bankruptcy court order authorizing realty mortgages "on all property owned by the debtor corporation and its subsidiaries," where the federal bankruptcy court declined to decide whether the limited partnership was a "subsidiary" and called the issue "a question of law" for resolution by the state courts?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents, R. Dixon Wood and Don W. Heiple, respectfully pray that this Court refuse to issue a writ of certiorari to review the decision of the Arizona Court of Appeals, Division One, entered on December 26, 1980 and award respondents damages against petitioners pursuant to Supreme Court Rule 49.2

RESTATEMENT OF THE CASE

The Holiday Isle limited partnership (the "limited partnership") was formed in 1964. Since its formation, petitioner Holiday Mobile Home Resorts, Inc. ("Holiday Mobile") has been the general partner with full responsibility for management. *Wood v. Holiday Mobile Home Resorts, Inc.*, ____ Ariz. App. ____, 625 P.2d 337, 340 (1981).

On March 10, 1971, Holiday Mobile was placed in federal bankruptcy proceedings under Chapter X of the Bankruptcy Act. *Id.* Subsequently, the federal Bankruptcy Court approved a plan whereby petitioner Wilfred O. Dunkel acquired control of Holiday Mobile by agreeing to provide a letter of credit and cash to bring current Holiday Mobile's debts, in return for a controlling interest in its common stock and mortgages on real property owned by Holiday Mobile and "its subsidiaries." As a result of this action, Dunkel did receive a mortgage from Holiday Mobile on the real property owned by it and its subsidiaries. *Id.* In addition, Dunkel caused Holiday Mobile, as general partner of the Holiday Isle limited partnership, to execute a mortgage on the real property of the limited partnership without the approval of any of the limited partners. The mortgage on all the properties was in the face amount of $1,250,000. *Id.* Holiday Mobile's Chapter X proceeding in Bankruptcy Court was thereafter terminated.

In July 1973, Holiday Mobile sent to each limited partner a letter requesting consent to the sale of the sole asset of the limited partnership, its mobile home park in Tucson, Arizona, for a sales price of $1,400,000. The letter proposed that the limited partnership be dissolved and that the outstanding mortgages on the limited partnership's property, including the mortgage to Dunkel, be paid. The letter also stated that ". . . if we fail to obtain your consent, we will have no alternative but to take immediate legal action to recover on the debt obligation from the limited partnership, and foreclose the park so that it might be sold. . ." *Id.* at 341. Respondents, faced with the imminent sale of the limited partnership property by petitioners without the written consent of the limited partners and in contravention of the requirements of Ariz. Rev. Stat. § 29-309 (1956), commenced the underlying action for an accounting and dissolution of the limited partnership.

By 1973 petitioners had violated the fiduciary duty they owed to the limited partnership in at least the following ways:

(1) Payment to a company controlled by petitioner Dunkel of management fees in violation of the Articles of Limited Partnership;

(2) Refusal to permit respondents to inspect the books and records of the limited partnership and removal of them from Arizona, despite the requirements of Ariz. Rev. Stat. § 29-310 (1956);

(3) Failure to provide the limited partners with detailed monthly accountings of receipts and disbursements of all funds of the limited partnership;

(4) Failure to have an annual audit of the limited partnership conducted by a certified public accountant;

(5) Using limited partnership assets to secure a loan by petitioner Dunkel to the general partner, petitioner Holiday Mobile, by placing the previously described mortgage on the limited partnership's mobile home park in August 1971;

(6) Gross misrepresentations to the limited partners; and

(7) Rejecting a third party's favorable offer to purchase the limited partnership's assets because of unfavorable tax consequences for the general partner, petitioner Holiday Mobile.

In May 1975, respondents attempted to reopen Holiday Mobile's Chapter X proceedings to obtain an interpretation of the July 8, 1971 Bankruptcy Court order (the "Order"), which allegedly authorized the $1,250,000 mortgage on the limited partnership's assets. The Order held in pertinent part "[t]hat Wilfred O. Dunkel shall receive as security . . . mortgages on all property owned

by the debtor corporation and its subsidiaries . . . providing for interest at the rate of 12% per annum. . . ." Pet. App. at A-5 (emphasis added).

The Bankruptcy Court, however, abstained from deciding whether the limited partnership was a "subsidiary" of its general partner, petitioner Holiday Mobile, subject to the Order. Instead, the Bankruptcy Court sent the issue back to the state courts for resolution, stating, "It's a question of law." Plaintiffs' Attempt to Reopen Holiday Mobile's Chapter X Proceedings, Transcript of Hearing dated May 21, 1975 at 11.

In the opinion below which is the subject of the petition, the Arizona Court of Appeals accepted the Bankruptcy Court's invitation and held that

> . . . this order on its face did not authorize the placing of a mortgage on the limited partnership property. First, the limited partnership property was not owned by the general partner, Holiday Mobile, but is considered to be owned by the limited partnership firm. *State v. Elsbury*, 63 Nev. 463, 175 P.2d 430 (1946). Second, Holiday Isle is not a "subsidiary" of the general partner, as the word "subsidiary" was defined at the time by the Bankruptcy Act as a "corporation" which is substantially owned or controlled by the bankrupt. 11 U.S.C. § 506 (13) (1970 ed., subsequently amended).

Wood, 625 P.2d at 345.

The Arizona Court of Appeals also decided that petitioner Dunkel was entitled to restitution from the limited partnership because his extension of credit to Holiday Mobile benefited Holiday Isle, Ltd. The state court therefore created an equitable mortgage on the limited partnership's real property "limited to the amount of benefits actually bestowed upon the limited partnership, the sum of $191,676.60 . . . bear[ing] interest at the

market rate at the time of the transaction, in this case, 6% per annum." *Id.* at 346.

Contrary to petitioners' claims, the Arizona Court of Appeals' discretionary creation of an equitable mortgage was *not* inconsistent with the Bankruptcy Court Order which allegedly created a 12% mortgage on the limited partnership's property. *Cf.* Pet. at 7. That Order simply did not authorize the placing of a mortgage on the *limited partnership's* assets but, rather, applied only to the assets of the general partner's *subsidiaries*. Thus, by placing an equitable mortgage with a six percent interest rate on the limited partnership property, the Arizona Court of Appeals did not "modify the terms of the Bankruptcy Court Order" [*id.* at 8] so as to collaterally attack the District Court's order. It merely exercised its independent equitable power to encumber real estate to provide restitutionary relief when it placed the $191,676.60, mortgage on the limited partnership property. *Wood*, 625 P.2d at 345.

Petitioners sought both rehearing by the Arizona Court of Appeals (which was denied on January 28, 1981) and review by the Arizona Supreme Court (which was denied on February 18, 1981). After these denials, the case was remanded to the trial court to carry out the dissolution and accounting. On April 28, 1981, nearly four years after the trial court first ordered an accounting and dissolution, the court appointed a receiver. In response, petitioners have once more sought to delay this outcome by petitioning this Court for review on writ of certiorari.

REASONS FOR DENYING THE WRIT

I. *No "Special and Important Reasons" Exist in this Action for Granting Review upon Writ of Certiorari.*

Petitioners have completely failed to raise any "special and important reasons" to support a grant of

review on writ of certiorari. Sup. Ct. R. 17.1. Nor have they demonstrated that the Arizona Court of Appeals "decided a federal question in a way in conflict with applicable decisions of this Court" [Sup. Ct. R. 17.1(c)] or with the decisions of either "another state court of last resort or of a federal court of appeals" [Sup. Ct. R. 17.1(b)]. As discussed in greater detail below, the Arizona Court of Appeals followed settled state and federal law to hold that the limited partnership's assets were not subject to the Bankruptcy Court's Order.

II. *The Arizona Court of Appeals Correctly Decided that the Limited Partnership's Real Property Was Not Subject to the Bankruptcy Court's Order.*

Notwithstanding petitioners' claims, the Arizona Court of Appeals correctly followed state and federal law when it held that the Bankruptcy Court's July 8, 1971 Order did not authorize a mortgage on the limited partnership's real property. The Order, by its very terms, reached only the "property *owned by the debtor corporation [Holiday Mobile] and its subsidiaries.*" *Wood,* 625 P.2d at 345 (emphasis in original). The Arizona Court of Appeals recognized that Holiday Mobile, as the limited partnership's general partner, did not "own" the limited partnership property under Arizona law. *Id.; citing State v. Elsbury,* 63 Nev. 463, 175 P.2d 430 (1946). Furthermore, since the old Bankruptcy Act defined a "subsidiary" of a Chapter X debtor "as a '*corporation*' which is substantially owned or controlled by the bankrupt" [*Wood,* 625 P.2d at 345 (emphasis added); *citing* 11 U.S.C. § 506(13) (1970 ed. subsequently amended)], the Arizona Court of Appeals could hardly have characterized the *limited partnership's* assets as those of a "subsidiary" subject to the Order.

It deserves emphasis that the Bankruptcy Court specifically refused to reopen the Chapter X proceedings

to determine whether the limited partnership was a "subsidiary" subject to the Order. Instead, it called the issue "a question of law" to be determined by the state court. The Bankruptcy Court clearly had the discretionary authority to defer this issue to the state court because the Order's interpretation would affect state-defined property rights. *Mangus v. Miller,* 317 U.S. 178, 186 (1942); *Thompson v. Magnolia Petroleum Co.,* 309 U.S. 478, 483-84 (1940); *Ex parte Baldwin,* 291 U.S. 610, 619 & n.12 (1934); *In re First Baptist Church, Inc.,* 564 F.2d 677, 680 (5th Cir. 1977); *Kaplan v. Guttman,* 217 F.2d 481, 483 (9th Cir. 1954); *In re United Merchants and Manufacturers, Inc.,* 3 B.R. 286, 301-02 (S.D.N.Y. 1980).

Therefore, the Court of Appeals' ruling was entirely proper because it neither collaterally attacked nor encroached directly on the Bankruptcy Court's Order. *National Acceptance Company of America, Inc. v. Frigidmeats, Inc.,* 627 F.2d 764, 765 (7th Cir. 1980). The Arizona Court of Appeals only interpreted the Order (following the Bankruptcy Court's express abstention) and determined that the limited partnership's property was not subject to it, an act proper under both federal and state law. *Popp v. Eberlein,* 409 F.2d 309, 311 (7th Cir.), *cert. denied,* 396 U.S. 909 (1969); *Kadish v. Phoenix-Scottsdale Sports Co.,* 11 Ariz. App. 575, 466 P.2d 794 (1970); *Cross Water Co. v. Ferrero,* 32 Cal. App.2d 497, 90 P.2d 98 (1939).*

In sum, the Arizona Court of Appeals never mod-

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*While petitioners correctly state that a district court's order entered after a proper exercise of jurisdiction cannot be collaterally attacked [*Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 376 (1940); *Cutler v. Huston,* 158 U.S. 423, 430-31 (1895)], that rule is totally inapposite to this case since the Arizona Court of Appeals construed the meaning of the Order only after the Bankruptcy Court refused to do so.

ified or invalidated a federally-ordered mortgage [*cf.* Pet. at 7-8]. Rather, it exercised its independent discretionary authority to create a separate, equitable $191,676.60 mortgage to provide petitioner Dunkel with restitutionary relief.

III. *Because the Petition Raises Only Frivolous Issues, Respondents Request the Court to Award Them Damages Pursuant to Supreme Court Rule 49.2.*

As demonstrated above, petitioners raise no colorable argument that the Arizona Court of Appeals acted contrary to the applicable decisions of this Court, any federal appellate court or any other state court regarding a "federal question." Instead, they have attempted to obscure the true factual nexis from which the petition arises to maximize the probability of review, and to thereby delay further the accounting and dissolution which the trial court and state appellate court have authorized.

In view of (i) the petition's total lack of merit and (ii) petitioners' obvious pursuit of review by the Court solely to delay the inevitable distribution of the limited partnership's assets, respondents urge the Court to award damages in their favor against petitioners pursuant to Supreme Court Rule 49.2 in the amount of the attorneys' fees and disbursements they have incurred in opposing this petition. As detailed in the Affidavit of Robert M. Owen in Support of Respondents' Request for Attorneys' Fees submitted herewith at A-1, respondents have paid $600.00 in disbursements to date and submit that $3,000.00 represents a reasonable award of attorneys' fees. Respondents also respectfully suggest that petitioners' frivolous effort is an appropriate petition against which to adjudge double costs pursuant to Supreme Court Rule 50.7.

CONCLUSION

For the foregoing reasons, the Court should decline to review this case by writ of certiorari.

Respectfully submitted,

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APPENDIX

IN THE

SUPREME COURT

OF THE UNITED STATES

HOLIDAY MOBILE HOME RESORTS, INC. and WILFRED O. DUNKEL, *Petitioners,* vs. R. DIXON WOOD and DON W. HEIPLE, *Respondents.*	No. 80-1964 AFFIDAVIT OF ROBERT M. OWEN IN SUPPORT OF RESPONDENTS' REQUEST FOR DAMAGES

ROBERT M. OWEN, being first duly sworn, deposes and states:

1. I am associated with the law firm of Brown and Bain, P.A. and make this affidavit in support of respondents' request for damages set forth in the Brief in Opposition to Petition for a Writ of Certiorari.

2. I have been a practicing attorney in Phoenix, Arizona since October 1980 and am one of the attorneys

for the respondents in this action. As such, I am fully aware of the facts and circumstances herein.

3. As of the date of this affidavit, the undersigned and members of the firm of Brown & Bain, P.A. spent more than 45 hours in connection with the opposition to the above-entitled petition for certiorari, including legal research regarding questions raised in the petition; preparation of respondents' Brief in Opposition to Petition for a Writ of Certiorari; and preparation of this Affidavit in Support of Respondents' Request for Damages.

4. In my experience, the amount of attorneys' fees hereinafter set forth is comparable to those charged for other attorneys in the Arizona legal community for comparable services and I hereby submit that the attorneys' fees for preparation of such a Brief in Opposition to Petition for Writ of Certiorari and related activities should not be less than $3,000.00.

5. Also, substantial printing charges have been incurred in the preparation of respondents' Brief in Opposition to Petition for a Writ of Certiorari. Those printing charges, as well as other sums necessarily disbursed in respondents' opposition to petitioners' brief, total no less than $600.00.

6. Petitioners' brief has raised no colorable issues of federal law deserving consideration by the Court and is, thus, totally frivolous. For that reason (and because this petition was sought merely to delay the ultimate resolution of this lawsuit in respondents' favor), an award of damages against petitioners pursuant to Supreme Court Rule 49.2 is appropriate.

7. Respondents' damages caused by Holiday Mobile Home Resorts, Inc. and Wilfred O. Dunkel's frivolous petition consist mainly of the aforementioned disbursements and attorneys' fees. These damages total no less than $3,600.00.

/s/

Robert M. Owen

SUBSCRIBED AND SWORN to before me this _____ day of June, 1981.

/s/

Notary Public

My Commission Expires:

_____

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

PHILIP P. BERELSON, being first duly sworn upon his oath, deposes and says that he is a member of the Bar of this Court and one of the counsel of record for respondents in this cause; that on this 18 day of June, 1981, he mailed three copies of respondents' Brief in Opposition to Petition for a Writ of Certiorari in this cause by depositing same in the United States mail, first-class postage prepaid, to:

Mr. Dale R. Shumway
UDALL, SHUMWAY, BLACKHURST,
ALLEN & DAVID, P.C.
30 West First Street
Mesa, Arizona 85201

and that he also mailed forty copies of respondents' Brief in Opposition to Petition for a Writ of Certiorari to the Clerk of this Court, first-class postage prepaid; all in compliance with Supreme Court Rule 28.

/s/
Philip P. Berelson

SUBSCRIBED AND SWORN to before me this 18 day of June, 1981.

/s/
Notary Public

My Commission Expires:

_____